



POLICE DEPARTMENT

September 14, 2018

In the Matter of Charges and Specifications

Case No.

- against -

2017-17276

Police Officer Eric St. Clair

Tax Registry No. 934202

Highway 2

At:

Police Headquarters  
One Police Plaza  
New York, New York 10038

Before:

Honorable Paul M. Gamble  
Assistant Deputy Commissioner Trials

APPEARANCES:

For the CCRB:

Simone Manigo, Esq.  
Civilian Complaint Review Board  
100 Church Street, 10th Floor  
New York, NY 10007

For the Respondent:

Craig Hayes, Esq.  
Worth, Longworth & London, LLP  
111 John Street, Suite 640  
New York, NY 10038

To:

HONORABLE JAMES P. O'NEILL  
POLICE COMMISSIONER  
ONE POLICE PLAZA  
NEW YORK, NEW YORK 10038

## CHARGES AND SPECIFICATIONS

1. Police Officer Eric St. Clair, on or about October 17, 2016, at approximately 1219 hours, while assigned to HWY 02 and on duty, in the vicinity of Pennsylvania Avenue and Belt Parkway, Kings County, wrongfully used force, in that he punched A in the face without police necessity.

P.G. 221-02, Page 2, Paragraph 11	Use of Force
P.G. 221-01	Use of Force
P.G. 221-02	Use of Force
2. Police Officer Eric St. Clair, on or about October 17, 2016, at approximately 1219 hours, while assigned to HWY 02 and on duty, in the vicinity of Pennsylvania Avenue and Belt Parkway, Kings County, wrongfully used force, in that he struck A with a baton without police necessity.

P.G. 221-02, Page 2, Paragraph 11	Use of Force
P.G. 221-01	Use of Force
P.G. 221-02	Use of Force
3. Police Officer Eric St. Clair, on or about October 17, 2016, at approximately 1219 hours, while assigned to HWY 02 and on duty, in the vicinity of Pennsylvania Avenue and Belt Parkway, Kings County, wrongfully used force, in that he eye-gouged A without police necessity.

P.G. 221-02, Page 2, Paragraph 11	Use of Force
P.G. 221-01	Use of Force
P.G. 221-02	Use of Force
4. Police Officer Eric St. Clair, on or about October 17, 2016, at approximately 1219 hours, while assigned to HWY 02 and on duty, in the vicinity of Pennsylvania Avenue and Belt Parkway, Kings County, was discourteous, in that he spoke discourteously to A, in that he repeatedly yelled "PUT YOUR FUCKING HAND BEHIND YOUR BACK" and "PUT YOUR HAND BEHIND YOUR FUCKING BACK" without sufficient legal authority.

P.G. 203-09, Page 1, Paragraph 2	Discourtesy
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5. Police Officer Eric St. Clair, on or about October 17, 2016, at approximately 1219 hours, while assigned to HWY 02 and on duty, in the vicinity of Pennsylvania Avenue and Belt Parkway, Kings County, abused his authority as a member of the New York City Police Department, in that he threatened A with the use of force, and said in sum and substance, "PUT YOUR OTHER HAND BEHIND YOUR BACK OR I'LL BREAK IT," without sufficient legal authority.

P.G. 203-09, Page 1, Paragraph 2	Discourtesy
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## REPORT AND RECOMMENDATION

The above-named member of the Department appeared before me on July 25, 2018. Respondent, through his counsel, entered a plea of Not Guilty to the subject charges. The CCRB-APU offered the hearsay statement of complainant A. Respondent testified on his own behalf. A stenographic transcript of the trial record has been prepared and is available for the Police Commissioner's review. Having reviewed all of the evidence in this case, I find that CCRB has failed to meet its burden of proof by a preponderance of the credible, relevant evidence. I, therefore, find Respondent Not Guilty of the charged misconduct.

## ANALYSIS

The following is a summary of the facts which are not in dispute in this case. On October 17, 2016, Respondent, assigned to Highway 2, was conducting speed limit enforcement on the eastbound Belt Parkway, just west of the Pennsylvania Avenue exit. Respondent was in uniform and was using a radar gun to monitor the speed of oncoming motorists. Respondent identified a vehicle being operated by A as exceeding the speed limit and directed him to pull over. Respondent conducted a car stop, which escalated into a physical altercation after A refused to turn over his license, registration, and proof of insurance. Respondent decided to take A into custody, rather than issue a summons after A refused to provide the requested documents despite being asked several times. Respondent admitted that in his attempt to place A under arrest, he used an arm bar, struck A's arm with the expandable baton several times, punched A in the face and used his thumbs to gouge A's eyes. Respondent also acknowledged that he used profanity several times during this altercation, threatening to break A's arm.

At issue, in this case, is: (1) whether Respondent's punches, baton strikes or eye gouge constituted unnecessary force; (2) whether Respondent's use of profanity was discourteous; and (3) whether Respondent's threat of force was without legal authority.

The following is a summary of the evidence presented at trial. Highway Patrol video of the incident (CCRB Ex. 2) captured audio of the exchange and images of the exterior of A's vehicle:

- 12:19:12-12:19:42-Respondent's RMP begins moving with siren activated. 's vehicle comes into frame, passing Respondent on the left. Respondent can be heard telling him over the PA to pull over to the right. As A begins to pull over, he moves toward a traffic light while braking but does not come to a full stop. Respondent can be heard saying, "Don't go through the red light; Jesus Christ." It appears that A stops in the crosswalk. When the light changes, Respondent can be heard telling him to proceed and pull over to the right, which he does.
- 12:19:50-12:20:40-Respondent approaches A's window and asks for license and registration. A responds inaudibly and Respondent replies, "Are you kidding me? You pulled yourself over." A says, "No, I mean" before his voice trails off and Respondent tells him, "86 in a 50, license and registration." A then asks "What are you talking about?" to which Respondent answers, "I had a laser." A answers back, "You do not have a laser." Respondent warns, "Sir, I am not going to argue. License and registration."
- 12:20:41-12:21 :01-A tells Respondent, "I am working . . . I have points on my license." Respondent states, "Maybe you shouldn't be speeding." A says he was not speeding. Respondent reiterates that he is not going to argue. He crouches down, gestures, and tells A, "You're not in control of this situation. Give me license, registration and proof of insurance or I can bring you to the precinct . . ."
- 12:21:04-12:21:22-A says something inaudible and Respondent replies "Excuse me, sir." He opens the driver's side door and says, "Let's go to the precinct," and reaching his left hand in the vehicle, repeats "Let's go." A says, "Don't touch me. What are you doing?" Respondent answers, "I can touch you," before reaching into the vehicle with both hands, appearing to attempt to pull A out. A asks, "Are you crazy?" and Respondent orders, "Get out of your car, get out, sir." His attempt to pull A out fails and he calls for backup, using his right hand, while his left arm remains partially in the vehicle.
- 12:21:25-12:21 :31-Respondent partially climbs into the vehicle, putting one knee on the driver's seat. He appears to be trying to pull A out unsuccessfully. He climbs all the way in and A can be heard asking again, "Are you crazy?"

- 12:21:35-12:22:37-Respondent orders A, "Give me your fucking hand." A begins screaming, "What are you doing? "Get off me" and "Ow" for several seconds as Respondent commands, "Put your fucking hand behind your back . put your other hand behind your back or I'll break it." A yells, "I can't. I can't" and "Stop, you're hurting me." Respondent repeatedly directs him to get his hand behind his back and A responds, "How would you like me to?"
- 12:22:40-12:23:46- Responds commands, "Stop resisting" and A says, "I'm not. You just attacked. I can't believe this is happening." The prior exchange is repeated multiple times with Respondent ordering, "Get your fucking hand behind your fucking back" and A answering, "How would you like me to do that?" and screaming "Ow" and "What are you doing?"
- 12:23:55-12:24:35-A highway tow truck pulls in front of A's vehicle and the driver approaches behind Respondent, asking "Are you alright?" He walks to the passenger side, opens the door and leans in, putting his arms in the vehicle. The sound of handcuffs being fastened is audible on the video. The yelling ceases but A says, "That was ridiculous, you attacked for no reason."
- 12:24:40-12:25:10- Respondent exits the car, out of breath, as backup arrives. Another Highway officer approaches the passenger door, pulls A out and puts him on the ground. Several other uniformed police officers respond to the scene, including three supervisors. A is stood up against the vehicle and frisked.
- 12:25:20-12:28:48-Respondent tells other officers on the scene that A would not turn over his license and would not get out of his car when ordered. A calls out, "You punched me in the face," and Respondent answers, "You're right, I did ." He also details that he hit A with the "stick" and poked his eye.

A was examined by EMS at the scene, but refused transportation to a hospital. On October 19, 2016, two days after the incident, A visited the emergency room at [REDACTED] Hospital in Brooklyn. Medical records indicated he complained of stiffness and pain in the upper back, knees and left extremities. According to the medical records, A told hospital personnel that he was stopped for speeding and that an officer beat him with his "stick" after "[I] resisted arrest." The medical diagnosis set forth that [REDACTED]

[REDACTED]

He was discharged the same day without any prescriptions and advised that he could follow up with a primary care physician (CCRB Ex. 6).

Respondent testified that on October 17, 2016, he was working alone in a marked RMP. He was performing speed enforcement while positioned on the right shoulder of the eastbound Belt Parkway. Respondent's vantage point on the right side of the road gave him a straight-on view of approaching vehicles. He observed A approaching and appearing to be speeding; Respondent used his point-to-point laser, aiming it west, to get a reading of his speed. The laser registered that A was driving 86 MPH<sup>2</sup> On cross-examination, Respondent agreed that there were three lanes of moderate traffic on the stretch of the parkway and that the video showed that some of those vehicles were changing lanes. He testified, however, that when he used the laser, he had an unobstructed view of A's vehicle (T. 22-25, 41-50, 111)

Respondent put his RMP in drive, activated the overhead turret lights and pulled onto the roadway. [REDACTED] who at first was behind him, passed him on the left. Respondent used his loudspeaker and directed that [REDACTED] stop the vehicle and pull over to the right. Respondent stated that [REDACTED] exited the highway but continued moving forward, almost going through a red light before stopping. Respondent acknowledged that he said "Jesus Christ," over the loudspeaker as he saw [REDACTED] proceeding toward the light, explaining that he was not aggravated, just concerned that [REDACTED] could cause an accident (T. 26-27, 54-56).

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<sup>1</sup> This report is consistent with the photos in evidence, taken by Respondent at the precinct, that show small lacerations and abrasions on [REDACTED] face, left arm, elbow and hand, as well as the photos taken the next day by Berkovich showing small scrapes and lacerations on the face, back of neck and left hand. (CCRB Exs. 3, 4)

<sup>2</sup> The speed limit on the Belt Parkway is 50 MPH.

Respondent approached A's window, which was already down, with his hand resting on his firearm, and asked for license and registration. He detected the scent of marihuana coming from the vehicle. A did not turn his documents over and asked why Respondent had stopped him. Respondent replied, "Are you serious? You pulled yourself over," before explaining the laser indicated he was doing 86 MPH in a 50 MPH zone. Respondent asked again for the license. A stated that he was working, had points on his driver's license and could not get "in trouble"; he also denied speeding and questioned whether Respondent actually had a laser. Respondent asked a third time for the license and registration, which by this point, he realized A had in his hand. He knelt to A's eye level, warning that they "could do [the exchange of license and registration] here on the street or . . . in the precinct." A said that he "[was] not going anywhere" (T. 27-33, 57-66).

Respondent then opened the driver's side door. He explained that in his past experience with drivers refusing to hand over documents, the act of opening the door made them "understand that this is real, that they need to give up their driver's license or they are going to end up in jail." He reached his hand out to take the documents, and A pulled them back, telling Respondent not to touch him, repeating, "I'm not going anywhere" (T. 30-31, 67). Respondent made the decision to place A under arrest and bring him to the 75<sup>th</sup> Precinct to verify his identity, as it was "clear" he not going to voluntarily surrender his documents. Respondent further explained that A's refusal to surrender his documents made him concerned that he was "hiding" something. Respondent also noted that he smelled marihuana in the vehicle and did not "know if [A] was high at that time"<sup>3</sup> (T. 31-33, 67-71).

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<sup>3</sup> Respondent confirmed that during arrest processing at the precinct, it was determined that [REDACTED] was not under the influence of drugs or alcohol (T. 107-08).

Respondent said "Come on, let's go" and placed his right hand on the left side of A's shirt, grasping A's right hand with his left. He denied striking him or jumping into the car. A pushed Respondent's right hand off his shirt and Respondent "proceeded to physically with both hands [try to] take him out of the vehicle." Respondent was unsuccessful in pulling A out and called for backup, before climbing inside the vehicle and handcuffing his left arm. He did not recall whether A had his seatbelt on, though he acknowledged seeing it on the video. A still did not surrender his right hand, told Respondent not to touch him and moved back over the center console. Respondent stated that he was on top of, but not directly laying on, A. Respondent repeatedly demanded A's right hand, admitting that he was using a raised voice and profanity during this exchange. Respondent testified that while A repeatedly said, "I can't, I can't" and asked "How would you like me to do that?" he flailed his hand to prevent Respondent from grasping it. According to Respondent, A "absolutely could have given his right hand" and if it was pinned underneath him, it was because "he moved it there." Respondent stated that while he was able to grab A's right hand a few times, he was never able to gain control of it (T. 32-34, 72-82, 87-90, 96, 100).

Respondent testified that as they struggled, A turned his body and reached toward the floor near the passenger seat. Respondent became concerned that he might be reaching for a weapon, but later found A's cell phone in that area. He placed A's right arm in an arm bar, which he described as a "pain submission" technique to try to get A to surrender his hand. Respondent conceded that he was "absolutely" using profanity toward A and threatened multiple times to break his arm to let him know "that

this is serious." A persisted in his refusal to surrender his right hand (T. 33-35, 95-100, 113-16).

Respondent next told A that he would hit his arm with his baton if he did not surrender his right hand.<sup>4</sup> He took out his baton, and, using his right hand, struck A twice on the elbow. The baton loosened, opening fully, so he paused to close it before striking again. A put his arm further underneath his body and said that Respondent was crazy. Respondent then punched A in the face twice with his right hand, after which A still refused to acquiesce to the arrest. Finally, Respondent employed an eye gouge, placing his thumb in A's eye, but A remained obstinate. Respondent estimated this struggle took approximately 4 minutes, though he testified that it "felt like an hour" because he was "by himself on the side of the road fighting with a guy who is bigger and younger than me. And I have no idea what's in his car"<sup>5</sup> (T. 35-37, 93-103).

When asked on cross-examination why he did not wait for backup before climbing into the vehicle, especially given that he did not know if there was a weapon present, Respondent explained, "Every police officer has a level of fear ... of what could possibly happen when you try to arrest somebody, especially on a vehicle stop ... I have to overcome that fear because I'm paid ... to be a police officer and to take somebody into custody if I have to. There [is] a level of fear, absolutely ... however, I'm responsible to do my job to the best of my abilities" (T. 83-85). Respondent did not believe that it would have been safe to cease trying to arrest A and wait for backup to arrive, given that they were in close quarters. A was not fully handcuffed and could have attempted to access any weapons which may have been in the

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<sup>4</sup> Respondent was not heard on the video saying this, though he agreed that everything else he said was captured (T. 101-103).

<sup>5</sup> Respondent testified that at the time of the incident, he was 36 years old, weighed 230 pounds and was 69 inches tall. (T.40).

vehicle. He was also concerned that if he waited for backup, A could attempt to flee the scene, possibly causing an accident (T. 113, 117-18).

The driver of a tow truck happened upon the scene, ran up to the vehicle and asked if Respondent was alright.<sup>6</sup> Respondent asked him to help hold A so that he could get his right hand behind his back. Respondent and the tow truck driver were successful in finally immobilizing A and backup officers arrived shortly thereafter. Another officer took A out of the car through the passenger door and placed him under arrest. The vehicle was searched and marijuana was recovered from the center console. Supervisors arrived at the scene and Respondent described to them the various types of force he had employed. Respondent was not injured during the struggle (T. 37-39, 103-08).

CCRB offered in evidence the November 9, 2016, hearsay statement of A (CCRB Ex. 1 A). In his statement, A recounted that on the afternoon of the incident, he was working delivering documents and driving east on the Belt Parkway in Brooklyn in his father's Infinity 250. He was in the middle lane and turned on his right turn signal so that he could get over toward the exit lane for Pennsylvania Avenue. As he did so, Respondent, who had been standing on the shoulder in a marked vehicle, moved behind him in his marked RMP with lights and sirens activated. A's was confused about whether to move to the left lane or stay to the right and pull over. He heard Respondent direct him over the loudspeaker to stay to the right and to wait for the light. He pulled up and stopped his vehicle, pulled out his license and registration and held them in his left hand (CCRB Ex. 1 A at 1-5, 15-16, 20-21, 25 ).

In his CCRB interview, A stated that when Respondent approached and asked to see his identification, A asked why he had been stopped. Respondent asked again for the

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<sup>6</sup> Respondent explained that the highway tow operators monitor the police radio bands (T. 104).

documents and A said, "Just let me know what I'm getting stopped for first."

Respondent told him he had been going 86 MPH on a 50 MPH road. A stated that he believed he had been driving at or around the speed limit and told Respondent that he had not been speeding. Respondent seemed to grow angered by this response and reached in to grab his license and registration from his hand; he did not get "a good grip" however, and the documents remained in A's hand. When Respondent told him he was going to be arrested, A responded, "For what? I didn't do anything wrong yet." A stated that Respondent then grabbed his left wrist, causing him to pull his body away "because I was a little taken [a]back . . ." According to A, this made Respondent "even more frustrated" and "it all exploded from there" (*Id.* at 5-6, 22-26).

A told the CCRB that Respondent, without first telling him to step out of the vehicle, pulled the door open and pushed him on his right side over the center console and the seats, "kind of laying on top of [A's side] with all his body weight." Respondent used his left arm to pull A's left hand up behind his back. A claimed that because of how Respondent was positioned on top of him, he was unable to move his right arm and comply with Respondent's command to "get [his] arm behind [his] back." A told Respondent, "I can't, I can't do it" multiple times; Respondent pulled his left arm up tighter and said repeatedly, "I'm going to break your arm." Respondent then struck A in the left elbow five or six times, causing "excruciating pain." Respondent then punched him in the left eye and, as a "last resort," used his thumbs to dig into A's left eye. A asserted that he yelled for Respondent to stop, crying out, "It hurts, it hurts," but did not fight back or resist arrest, which he knew would get him in trouble and impact his future (*Id.* at 7-10, 18, 27, 30-34, 38-39, 45-46).

A recounted that as Respondent attempted to push his hand down, he reached out with his right arm to blow the horn, hoping to get someone's attention. Respondent told him he would call for back-up and A replied, "Call everybody you can possibly call so they can see what you're doing right now because this is wrong." Several officers subsequently responded to the scene. A did not recall if he was handcuffed before or after being taken from the passenger door. He alleged that he was tossed on the ground, causing bruising to his knees, and then lifted against the car, "all extremely forceful," to be searched. Respondent was not one of the officers who searched him. A recalled that he repeatedly tried to explain that this was a misunderstanding, that Respondent had become aggressive and that an arrest would negatively impact his chances at dental school admission. He contended that "all the police officers were against [him] ... nobody wanted to help me," though he understood that "from their perspective, I look like the bad guy but I wasn't." He recalled that one officer told him not to make things up because he had worked with Respondent a long time and he was "the last officer to ever . . . [use] force." During the search of his person, he advised the officers that there was a small bag of marijuana inside the console, though he contended he had not used drugs that day and was saving it for when he was finished work (*Id.* at 10-12, 27-28, 35-37, 40-44, 47-49, 54).

EMS responded to the scene, but A declined treatment, although his hand was bleeding, claiming that he was not feeling pain "because of the adrenaline".<sup>7</sup> He was taken to the 75<sup>th</sup> Precinct, where he was held until approximately 0230 hours the next morning when he was taken to Central Booking. Once in the cell, A realized his hand was bleeding and asked

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<sup>7</sup> This is consistent with the EMS Pre-hospital care report for [REDACTED] which states, "Pt has no complaints [of] pain or discomfort...Pt has a very minor abrasion to face . . . no other injury. Refuses txp to hospital . . ." (CCRB Ex. 5).

for EMS to return, but a police officer cleaned the wound and said the cut was not deep enough to require stitches (*Id.* at 12-13, 16-17, 34, 59-60).

Ultimately, A was released at approximately 0800 hours on October 18<sup>th</sup> with a speeding ticket, about 36 hours after the initial encounter with Respondent. He claimed that he wanted to go to the hospital to get checked out, but decided to wait until the next day so that he could celebrate his brother's birthday with his family. He went to the hospital on October 19<sup>th</sup> for various scans and X-rays, all of which indicated there were no broken bones or other serious issues. He remained out of work for about a week. A announced his intention to file a lawsuit, asserting, "All the treatment that I got....was like as if I was this hardened criminal ... that's not the case at all" (*Id.* at 13-15, 49, 54, 57-58).

Few things are more difficult, yet more fundamental to the role of a trier of fact, than attempting to reconstruct past events on the basis of opposing accounts. In a hearsay case of this nature, particular attention must be paid to the evidence. This tribunal has held many times that while hearsay is admissible in administrative proceedings, and may be the sole basis for a finding of fact, it must be carefully evaluated before it is relied upon. The more important the evidence is to the case, the more critically it should be assessed (*Police Department v. Acosta*, OATH Index No. 464/00 [Jan. 7, 2000]). Factors such as corroboration, consistency, bias, logic and the degree to which an account comports with common sense and general human experience must be taken into account (*Maloney v. Suardy*, 202 A.D.2d 297, 609 N.Y.S.2d 179 [1<sup>st</sup> Dep't 1994]).

I credit Respondent's testimony as logical, forthright and candid. A significant portion of Respondent's testimony was corroborated by the video. The portions of Respondent's testimony dealing with aspects of the interaction which were not captured on either the video or audio recordings were nevertheless credible based upon his demeanor before the Tribunal which

remained consistent, even when his testimony was challenged on cross-examination. While it is not clear on the audio portion of the video, I nevertheless credit Respondent's testimony that A told him, "I'm not going." I also credit Respondent's testimony as being consistent with several admissions to the use of force he made to supervisors who responded to the scene. I am mindful that Respondent is an interested witness in this proceeding; his testimony, however, when considered in the context of the entire record, was credible.

I find A's hearsay statement lacked sufficient indicia of reliability to support a finding of guilt. While A claimed that Respondent opened his driver's door and jumped on him without warning, the video recording established that Respondent: (1) asked for A's license and registration four times and A did not comply; (2) warned A, in sum and substance, that he would be arrested if he did not surrender his documents; and (3) opened the driver's door, telling A, "Let's go." A also admitted during his October 19, 2016, hospital visit that he had been resisting arrest.

#### *1. Wrongful Use of Force*

Respondent is charged in Specifications 1, 2 and 3 with the wrongful use of force against A, respectively, for (1) punching him in his face; (2) striking him with a baton; and (3) gouging him in his eye. I find that CCRB has failed to meet its burden of proof by a preponderance of the credible, relevant evidence that Respondent employed any of the aforementioned uses of force without police necessity.

Patrol Guide procedure 221-01 sets forth the following:

When appropriate and consistent with personal safety, members of the service will use de-escalation techniques to safely gain voluntary compliance from a subject to reduce or eliminate the necessity to use force. In situations in which this is not safe and/or appropriate, MOS will use only the reasonable force necessary to gain control or custody of a subject. The use of deadly physical force against a person can only be used to protect MOS and/or the public from

imminent serious physical injury or death.

(P.G. 221-01).

Patrol Guide procedure 221-02 sets forth the following requirements for the use of force:

When a member of the service must gain compliance, control, or custody of an uncooperative subject, the member should comply with P.G. 221-01, "Force Guidelines". . . . (2) utilize de-escalation techniques when appropriate and consistent with personal safety, which may reduce or eliminate the need to use force, and increase the likelihood of gaining the subject's voluntary compliance and . . . (11) apply no more than the reasonable force necessary to gain control.

(P.G. 221-02).

While it is true that the Patrol Guide imposes a duty upon a police officer with the lawful authority to effect an arrest to consider de-escalation as a tactic, such consideration is fact specific and dependent upon the attendant circumstances. In this case, CCRB has argued that Respondent's decision to proceed with a solo arrest violated the Patrol Guide's requirement that he consider de-escalation as a tactic. The Tribunal disagrees with this blanket assertion.

It is not contested that Respondent had probable cause to place A under arrest for the speeding violation when he refused to provide identification (*see Atwater v. City of Lago Vista*, 532 U.S. 318 [2001] [Fourth Amendment does not prohibit a warrantless arrest for a minor offense]; *see also People v. Marsh*, 20 NY2d 98 [1967] [N.Y Vehicle and Traffic Law § 155 a traffic violation may serve as a predicate for an arrest without a warrant]). The preponderance of evidence also established that A resisted arrest by pulling his left arm back when Respondent first grasped it. This act of resistance was captured on the video. Moreover, hospital records admitted into evidence indicate that A admitted to "resisting" the arrest two days later during his hospital visit. At this point in the interaction, Respondent had legal authority to place his hand on A to effectuate the arrest.

At issue here, is whether Respondent was justified in using the additional force exerted while in the vehicle. As stated in the Patrol Guide, MOS may use "no more than the reasonable force necessary to gain control."

A determination of whether the force used by Respondent was necessary and reasonable must turn on the specific acts of resistance the force was used to overcome. There is no dispute that the video does not depict A's body in any way while he is inside his car; the first time A appears on camera is as he is being removed from the car by a second un named Highway officer. Similarly, the video does not depict Respondent's body once he enters the car or any physical acts he committed therein. A did not voluntarily exit the vehicle. What is clear is that during the three minutes Respondent and A were in the car, A did not voluntarily give Respondent his right hand for cuffing. CCRB argues that A was unable to comply because of his position in the vehicle.

While the audio portion of the video did capture Respondent ordering A to give him his hand and A's assertion that he could not. A did not appear before this Tribunal to expound upon this claim, subject to cross-examination. A's hearsay statement is also unhelpful, as some material factual assertions made therein are inconsistent with other credible, relevant evidence in the case. For example, how did A claim that he reached for the car horn but not be physically able to comply with Respondent's lawful order.

In contrast, Respondent testified before this Tribunal and was a credible witness. I credited Respondent's testimony that he was able to place a handcuff on A's left hand, but was unable to handcuff his right hand until after they struggled inside the car and a bystander later assisted Respondent. This testimony is corroborated by the audio portion of the video recording, which clearly captured several demands by Respondent for A to surrender his

right hand. While the video evidence does not capture the force used. Respondent admitted to the physical acts set forth in Specifications 1, 2 and 3 while at the scene of the incident, as well as during his testimony before this Tribunal.

Respondent also testified credibly that during his attempt to place A under arrest, A instead moved to his right and leaned further into the passenger compartment of his vehicle, another clear act of resistance. Respondent then knelt on the driver's seat in order to maintain contact with A, thereby bringing the upper part of his body into the vehicle. Respondent claimed A extended his right hand toward the passenger door before he could place his handcuffs on it. According to Respondent, A then began to reach under the passenger seat. While Respondent candidly conceded that he did not know what A was reaching for, his concern was that he was reaching for a weapon, a reasonable concern under the circumstances. Respondent conceded further that he later discovered that A's phone was under the passenger seat, which is corroborated by A's request to "call someone," which was captured on the audio portion of the video.

Based upon the foregoing, there is insufficient credible, relevant evidence regarding the specifics of the struggle inside A's car to permit the Tribunal to find, by a preponderance of the evidence, that Respondent's actions were unnecessary under the circumstances he faced during this incident.

Accordingly, I find Respondent Not Guilty of Specifications 1, 2 and 3.

2. *Dishonesty*

Patrol Guide procedure 203-09 requires Members of Service to be courteous and respectful (P.G. 203-09[2]).

Respondent used profanity during his interaction with A. This Tribunal, however, has long held that language which would ordinarily be inappropriate in dealing with civilians may be excused in the course of a violent confrontation (*see Disciplinary Cases 2015-14616, 2015-14617* [December 19, 2016]). In this case, Respondent was in a physical confrontation with an adult male who offered determined resistance to an arrest. Under the circumstances presented in this case, Respondent's verbal bellicosity did not constitute misconduct. While it is possible that the evidence before the Tribunal may have supported a finding that Respondent was discourteous toward A in his tone and language before he opened the car door, he was not charged with this misconduct.

Accordingly, I find Respondent Not Guilty of Specification 4.

### *3. Threat of Force*

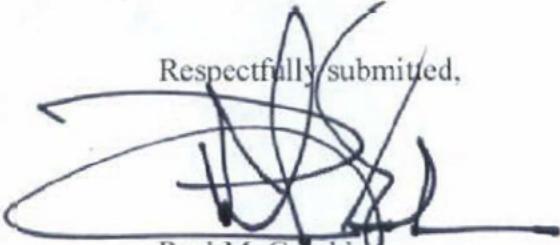
As set forth above, Patrol Guide procedure 203-09 requires Members of Service to be courteous and respectful (P.G. 203-09[2]).

Respondent's verbal threats were excusable under the circumstances of this case. This Tribunal has held that language which would be inappropriate for the vast majority of police-citizen encounters may be excused when used as a means of verbal suasion intended to dissuade a suspect from active resistance to an arrest (*see Disciplinary Cases 2015-14616, 2015-14617* [December 19, 2016]). In this case, Respondent candidly admitted the use of a threat to break A's arm and offered a plausible rationale for doing so. The credible evidence establishes that A mounted determined resistance to being handcuffed in the face of a

lawful arrest. Under these unique circumstances, Respondent's threat does not constitute misconduct.

Accordingly, I find Respondent Not Guilty of Specification 5.

Respectfully submitted,

  
Paul M. Gamble  
Assistant Deputy Commissioner Trials

**APPROVED**

OCT 26 2018  
  
JAMES P. O'NEILL  
POLICE COMMISSIONER